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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION TWO

THE PEOPLE,

Plaintiff and Respondent,

v.

HUGO ARELLANO,

Defendant and Appellant.

E056774

(Super.Ct.No. BLF003439)

OPINION

APPEAL from the Superior Court of Riverside County. B. J. Bjork, Judge.

Affirmed.

Jesse A. Moorman, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Julie L. Garland, Assistant Attorney General, William M. Wood and Marilyn L. George, Deputy Attorneys General, for Plaintiff and Respondent.

On February 10, 2005, defendant and appellant Hugo Arellano pled guilty to two felony counts of bringing a controlled substance into a prison or jail. (Pen. Code, § 4573.)¹ The trial court sentenced defendant to 36 months of probation. On June 8, 2012, defendant filed a motion to vacate the judgment and withdraw the plea. The court denied the motion. On appeal, defendant contends the court erred in denying his motion because he was not advised of the immigration consequences of his plea. We affirm the judgment.

FACTUAL AND PROCEDURAL HISTORY

On February 1, 2005, the People charged defendant by complaint of a felony attempt to bring controlled substances into Chuckawalla Valley State Prison on January 29, 2005 (count 1—§ 4573); felony attempt to bring a controlled substance into Riverside County Jail in Blythe, also on January 29, 2005 (count 2—§ 4573); and misdemeanor resisting arrest (count 3—§ 148, subd. (a)). Defendant entered into a plea agreement whereby he would plead guilty to counts 1 and 2; count 3 would be dismissed, and he would be granted 36 months of probation.

Defendant's counsel did not concur with defendant's plea and refused to sign the plea form. On the plea form, defendant initialed all the provisions regarding advisement and waiver of his rights. However, defendant did not initial the provision acknowledging he had read and understood the five consequences of the plea, one of which provided, "If I am not a citizen of the United States, I understand that this conviction may have the

¹ All further statutory references are to the Penal Code unless otherwise indicated.

consequences of deportation, exclusion from admission to the United States, or denial of naturalization pursuant to the laws of the United States.”

Defendant signed and dated a provision below the aforementioned sections indicating, “I have read and understand each statement that I have initialed.” Defendant’s interpreter signed and dated the statement at the bottom of the form, which read, “Having been duly sworn, I have truly translated this form to the defendant in the Spanish language. The defendant has stated that he/she fully understood the contents of the form prior to signing.” Defendant initialed another portion of the plea agreement that read: “I have had an adequate time to discuss my case with my attorney, including . . . the consequences of any guilty plea[.]”

At the oral taking of defendant’s plea, defense counsel reiterated he did not join in the plea, but was “satisfied that my client understands and he is intelligently waiving[.]” Defendant informed the court he had gone over the plea with both his attorney and the interpreter. The court asked defendant if he understood “the consequences, including immigration consequences[.]” Defendant replied he did. After taking defendant’s plea, the court engaged in the following colloquy with defendant:

“The Court: Did the interpreter go over with you all these terms and conditions?

“The Defendant: Yes.

“The Court: Do you understand those terms and conditions?

“The Defendant: Yes.

“The Court: Do you agree to comply with those terms and conditions?

“The Defendant: Yes.”

The court then sentenced defendant to 36 months of probation with 18 days of jail time, for which defendant received 12 days of actual and six days of conduct credit (time served).

DISCUSSION

Defendant contends the court erred in denying his motion to vacate the judgment and withdraw his plea because the record fails to provide he was advised of the immigration consequences of his plea. Therefore, he maintains the People failed to overcome their burden of proof of clear and convincing evidence on the rebuttable presumption defendant was not so advised where the record fails to establish such advisement. We disagree and, therefore, affirm the judgment.

“Penal Code section 1016.5 requires that, before accepting a plea of guilty or nolo contendere to any criminal offense, the trial court must advise the defendant that if he or she is not a United States citizen, conviction of the offense may result in deportation, exclusion from admission to the United States, or denial of naturalization. The statute allows the defendant to move to vacate the judgment if the trial court fails to give the required advisements.” (*People v. Totari* (2002) 28 Cal.4th 876, 879, fn. omitted.) “[A] motion to vacate a judgment under section 1016.5 may be brought in the trial court after judgment has been imposed.” (*Ibid.*)

“To prevail on a motion to vacate under section 1016.5, a defendant must establish that (1) he or she was not properly advised of the immigration consequences as provided by the statute; (2) there exists, at the time of the motion, more than a remote possibility that the conviction will have one or more of the specified adverse immigration

consequences; and (3) he or she was prejudiced by the nonadvisement. [Citations.] On the question of prejudice, defendant must show that it is reasonably probable he would not have pleaded guilty or nolo contendere if properly advised. [Citation.] Whether defendant knew of the potential immigration consequences, despite inadequate advisements at the time of the plea, may be a significant factor in determining prejudice or untimeliness. [Citation.]” (*People v. Totari, supra*, 28 Cal.4th 876 at p. 884.)

“Absent a record that the court provided the advisement required by this section, the defendant shall be presumed not to have received the required advisement.” (§ 1016.5, subd. (b).)

“The advisement need not be in the statutory language, and substantial compliance is all that is required, ‘as long as the defendant is specifically advised of all three separate immigration consequences of his plea.’ [Citation.]” (*People v. Castro-Vasquez* (2007) 148 Cal.App.4th 1240, 1244; *People v. Soriano* (1987) 194 Cal.App.3d 1470, 1475.)

Indeed, the court is not obligated to verbally advise defendant of the potential immigration consequences of a guilty plea. A validly executed plea agreement that adequately advises defendant of possible immigration consequences from defendant’s plea is sufficient advisement to comply with statutory requirements. (*People v. Ramirez* (1999) 71 Cal.App.4th 519, 521-523; *People v. Gutierrez* (2003) 106 Cal.App.4th 169, 175.)

“An order denying a section 1016.5 motion will withstand appellate review unless the record shows a clear abuse of discretion. [Citations.] An exercise of a court’s discretion in an arbitrary, capricious, or patently absurd manner that results in a manifest

miscarriage of justice constitutes an abuse of discretion. [Citation.]” (*People v. Limon* (2009) 179 Cal.App.4th 1514, 1517-1518.) The court, deciding whether the defendant has made a sufficient showing under section 1016.5, “is the trier of fact and . . . the judge of the credibility of the witnesses or affiants. Consequently, it must resolve conflicting factual questions and draw the resulting inferences. [Citation.]” (*People v. Quesada* (1991) 230 Cal.App.3d 525, 533.)

Here, the record demonstrates substantial compliance with the requirement that defendant be advised of the immigration consequences of his plea. First, defendant’s interpreter signed the agreement indicating she had translated the entire form to defendant, not merely the portions defendant initialed or signed. Moreover, defendant’s signature averred he understood the contents of the entire form before he signed it. The plea form contains a specific provision regarding the consequences of the plea: “If I am not a citizen of the United States, I understand that this conviction may have the consequences of deportation, exclusion from admission to the United States, or denial of naturalization pursuant to the laws of the United States.” Thus, although he did not initial the provision regarding the consequences of his plea, substantial evidence supports the inference defendant was read and understood the immigration consequences of his plea.

Second, defendant initialed the portion of the plea agreement indicating he had had sufficient time to discuss the case, “including . . . the consequences of any guilty plea” with his attorney. This necessarily includes any immigration consequences of his plea. Third, although not joining in the plea, defendant’s counsel noted, “I am satisfied that my client understands and he is intelligently waiving[.]” Thus, defense counsel

indicated he had discussed the plea and its consequences with defendant and that defendant understood the agreement. Fourth, the court inquired of defendant whether he had gone over the entire plea form with both his attorney and interpreter; defendant replied he had. Fifth, the court specifically, orally inquired whether defendant understood the immigration consequences of his plea; defendant replied he did.

Sixth, after taking defendant's plea, the court expressly queried defendant whether the interpreter had gone over the terms and conditions of the plea with him and whether he understood and agreed to them; defendant responded that the interpreter had, and he did. Thus, the record establishes defendant had both written and verbal notice of the immigration consequences of the plea, which were discussed with him by his interpreter, his counsel, and the court. Although it would have been preferable to have defendant's initials on the consequences portion of the plea and/or the court's specific advisement of all three potential immigration consequences of the plea, the record establishes substantial compliance with the advisement requirement.

Finally, the court below indicated it had reviewed all pertinent portions of the record regarding defendant's plea, including the preliminary hearing, which is not contained in this record. The court placed particular emphasis on defendant's affirmative response to the plea court's specific query whether he understood the immigration consequences of his plea. The court further noted defendant had gone over the plea agreement, which warned of the immigration consequences of the plea, with both his counsel and interpreter. Thus, the court's denial of defendant's motion was within its discretion.

DISPOSITION

The judgment is affirmed.

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MILLER
J.

We concur:

RAMIREZ
P. J.

HOLLENHORST
J.